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Clark Bigler and Utah Taxpayers Association v. Glen K Vernon : Brief of Appellant

Utah Supreme Court

Ray, Quinney & Nebeker; Dale M. Okerlund; Craig Carlile; Attorneys for Appellees.
Holme Roberts & Owen; Mark K. Buchi; David J. Crapo; Attorneys for Appellants.

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

CLARK BIGLER and UTAH TAXPAYERS ASSOCIATION, Plaintiffs/Appellants, vs. GLEN K. VERNON, PAYSON City Administrator and PAYSON CITY CORPORATION, Defendants/Appellees.	Case No. 920003 Priority No. 16

BRIEF OF APPELLANTS

ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
FOR UTAH COUNTY, STATE OF UTAH - JUDGE RAY M. HARDING

RAY, QUINNEY & NEBEKER
Dale M. Okerlund #3743
Craig Carlile #0571
92 North University Avenue
Provo, Utah 84601
Telephone: (801) 226-7210

Attorneys for Appellees

HOLME ROBERTS & OWEN
Mark K. Buchi, #0475
David J. Crapo, #5055
50 South Main Street, Suite 900
Salt Lake City, Utah 84144
Telephone: (801) 521-5800

Attorneys for Appellants

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Dale M. Okerlund #3743
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92 North University Avenue
Provo, Utah 84601
Telephone: (801) 226-7210

Attorneys for Appellees

HOLME ROBERTS & OWEN
Mark K. Buchi, #0475
David J. Crapo, #5055
50 South Main Street, Suite 900
Salt Lake City, Utah 84144
Telephone: (801) 521-5800

Attorneys for Appellants

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TEXT OF CONSTITUTION AND STATUTES SUBJECT TO INTERPRETATION

I. Utah Constitution, article VI, section 1, reads as follows:

The Legislative power of the State shall be vested:

1. In a Senate and House of Representatives which shall be designated the Legislature of the State of Utah.

2. In the people of the State of Utah, as hereinafter stated:

The legal voters or such fractional part thereof, of the State of Utah as may be provided by law, under such conditions and in such manner and within such time as may be provided by law, may initiate any desired legislation and cause the same to be submitted to a vote of the people for approval or rejection, or may require any law passed by the Legislature (except those laws passed by a two-thirds vote of the members elected to each house of the Legislature) to be submitted to the voters of the State before such law shall take effect.

The legal voters or such fractional part thereof as may be provided by law of any legal subdivision of the State, under such conditions and in such manner and within such time as may be provided by law, may initiate any desired legislation and cause the same to be submitted to a vote of the people of said legal subdivision for approval or rejection, or may require any law or ordinance passed by the law making body of said legal subdivision to be submitted to the voters thereof [i.e. referendum] before such law or ordinance shall take effect. [Emphasis added].

II. Utah Code Ann. § 20-11-21, reads as follows:

(1) Subject to the provisions of this chapter, the legal voters of any county, city, or town, in numbers required by this chapter,

may initiate any desired legislation and cause it to be submitted to the governing body or to a vote of the people of the county, city, or town for approval or rejection, or may required any law or ordinance passed by the governing body of the county, city or town to be submitted to the voters before the law or ordinance takes effect.

(2) (a) The legal voters of any county, city, or town may not initiate budgets or changes in budgets, or tax levies or changes in tax levies.

(b) The legal voters of any county, city, or town may not require any budget or tax levy adopted by the governing body of the county, city or town to be submitted to the voters. [Emphasis added].

III. **42 U.S.C. § 1983 reads as follows:**

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

JURISDICTION

The Supreme Court has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2-2(3)(j) (1992)[1] and Utah Rules of Appellate Procedure 4.

ISSUES PRESENTED FOR REVIEW

Issue 1: Whether the declaratory judgment claims, seeking a declaration of the Appellants' rights and legal relations under the referral provisions of the Utah Constitution and Utah Code Ann. § 20-11-21(2)(b) to refer or initiate any new tax legislation, are moot because the 30-day period for filing a petition against a specific Payson City utility tax ordinance has passed?

Issue 2: Whether Utah Code Ann. § 20-11-21(2)(b), on its face, violates Article VI, § 1 of the Utah Constitution which guarantees a right of access to the referendum and initiative process for "any legislation?"

Issue 3: Whether Utah Code Ann. § 20-11-21(2)(b), as applied to any new tax legislation or the Payson City utility tax ordinance, violates Article VI, § 1 of the Utah Constitution which guarantees a right of access to the referendum and initiative process for "any legislation."

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1. Hereinafter all citations to the Utah Code Annotated are to the most recent codification as amended.

Issue 4: Whether Utah Code Ann. § 20-11-21(2)(b) prohibits the people of Payson City from submitting an Application for Petition Copies when the underlying petition seeks to refer a newly enacted municipal tax legislation or the Payson City utility tax ordinance to a referendum vote?

Issue 5: Whether the Payson City ordinance enacting the utility tax created a new tax scheme or was otherwise legislative in nature?

Issue 6: Whether the Appellees refusal to issue petition copies deprived Appellants of their right to "petition the government for a redress of grievances" in violation of the First Amendment of the United States Constitution?

Issue 7: Whether Appellants are entitled to an injunction ordering Payson City to issue the requested petition copies in regard to the application and also allow Appellants a reasonable time to gather signatures in an attempt to file a petition against the Payson City utility tax ordinance?

Issue 8: Whether the Appellants are entitled to an award of costs and attorneys fee under 42 U.S.C. §§ 1983, 1988?

STANDARD OF APPELLATE REVIEW

Each of the above issues are questions of law which relate to the interpretation of statutes and constitutions.

Accordingly, the Utah Supreme Court gives no deference to the District Court's conclusions. Clover v. Snowbird Ski Resort, 808 P.2d 1037 (Utah 1991); Bonham v. Morgan, 788 P.2d 497 (Utah 1989).

STATEMENT OF THE CASE

I. Statement of Facts.

In article VI of the Utah Constitution the people of Utah expressly retained the right to refer or initiate any legislation. The Utah statutes that prescribe the method by which the people may commence a referendum or initiative require that five sponsors sign and file an application for certified petition copies (an "Application") with the city recorder. Utah Code Ann. §§ 20-11-7, 23. Once the Application is filed, the recorder is obligated to give the sponsors certified petition copies for circulation.

The sponsors then circulate the petition copies in an effort to obtain the requisite number of signatures. After the appropriate number of signatures are obtained, the certified petition copies (the "Petition") are filed with the recorder. This Petition must be filed with the recorder within 30 days after the enactment of the ordinance being challenged. Utah Code Ann. §§ 20-11-24, 23. The recorder then verifies the signatures and marks the Petition as either "sufficient" or "insufficient." Utah Code Ann. §§ 20-11-16,

23. If the Petition is sufficient, the recorder prepares a ballot in which the citizens will be allowed to vote in favor of or against the question presented in the Petition. If the recorder refuses to accept the Petition and place it on the ballot, a citizen may file a writ of mandamus with this Court, within 10 days of the refusal, to compel the recorder to mark the Petition as sufficient and place it on the ballot. Utah Code Ann. §§ 20-11-16, 23.

On March 7, 1990, the Payson City Counsel passed City Ordinance No. 02-21-90a (the "Ordinance"), entitled "An Ordinance Establishing A Utility Revenue Tax To Be Collected On Gross Receipts For Electric, Gas, And Telephone Services In Payson City, Utah." (R. at 56-58). The Ordinance established an entirely new tax in Payson City whereby Payson City "levied upon the business of every person or company engaged in business in Payson City, of supplying telephone, gas, or electric energy service as public utilities, an annual license tax equal to 6 percent (6%), of the gross revenue derived from the sale and use of services of such utilities . . . within the corporate limits of Payson City." (R. at 58).

On March 26, 1990, the Appellants and other concerned citizens timely filed an Application for Petition Copies for a referendum Petition requesting that the Ordinance be referred to the people of Payson City for their approval or rejection. (R. at 5). By letter dated April 2, 1990, the Appellees gave

notice to the Appellants that they would not provide the certified petition copies requested by the Application and stated that they were of the "opinion that § 20-11-21(2)(b) of the Utah Code prohibit[ed] submitting" the Ordinance to a referendum vote. (R. at 1).

II. Proceedings Before the District Court.

On October 17, 1990, the Appellants filed a Complaint in the Fourth Judicial District Court for Utah County, State of Utah in which they requested that the court enter a declaratory judgment that Utah Code Ann. § 20-11-21(2)(b) did not restrict their right to refer or initiate an ordinance that challenges or enacts a new tax scheme. (R. at 1-14). In the alternative, Appellants asked the District Court to enter a declaratory judgment that Utah Code Ann. § 20-11-21(2)(b) was unconstitutional because it violated their rights under Utah Const. art. VI, § 1 to bring referenda and initiatives. (R. at 9-10). The Appellants asked for additional relief that a judgment be entered finding that the Appellees' conduct violated the Appellants' rights under the Utah and United States Constitutions and a judgment ordering Payson City to provide petition copies to the Appellants. (R. at 7-8).

The primary thrust of Appellants' case is the declaratory challenge of Payson City's refusal to recognize the Application and issue certified petition copies. In their

Complaint, the Appellants specifically sought the following relief (R. at 7-8):

1. A declaration that Article VI of the Utah Constitution allows citizens to bring a referendum or initiative against a new tax scheme.

2. A declaration that Utah Code Ann. § 20-11-21(2)(b)'s prohibition against "tax levy" referenda and initiatives does not include the legislative act of creating a new tax scheme and, if it does, that this statute is unconstitutional because it violates Article VI of the Utah Constitution.

3. A declaration that Payson City's refusal to recognize the Application violated the citizen's federal and civil rights.

4. An injunctive order that would compel Payson City to recognize the Application filed on March 26, 1991 and issue certified petition copies.

5. An order awarding reasonable attorney's fees under the Federal Civil Rights Act.

On November 6, 1991, the Honorable Ray M. Harding of the Fourth Judicial District Court in and for Utah County issued a Memorandum Decision, wherein the District Court found that (1) "Plaintiffs' failure to file the petition in thirty days as required by Statute, and the Constitution precludes their claim," (2) "had plaintiffs acted in a timely fashion they could have brought this claim, as this was a legislative not administrative manner [sic]," (3) the franchise utility tax "was an entirely 'new scheme of taxation' and that the creation of a tax is a legislative matter and is therefore an appropriate subject matter for referendum," and (4) "while

defendants should have given plaintiffs the petition, plaintiffs, according to the Constitution, should have taken appropriate action either to compel the petition be given to plaintiffs or prepared their own within the proper time limit." (R. at 265-266). As the prevailing party, the Appellants were instructed to "prepare [the] Summary Judgment within 15 days of the Memorandum Decision. (R. at 265).

Believing that the Memorandum Decision memorialized the District Court's declaratory rulings on the declaratory judgment issues it presented in its Complaint, Appellants began to prepare the Summary Judgment Order. On or about November 13, 1991, Appellants received a telephone call from Appellees' counsel that the District Court was going to amend the November 6 Memorandum Decision to have the Appellees prepare the Summary Judgment Order instead of the Appellants. (R. at 267).

Appellants immediately requested a telephone hearing before the District Court with opposing counsel to discuss the reasons for the District Court's amendment. During the telephone hearing with the District Court on November 19, 1991, Appellants were informed that the District Court believed that findings 2, 3 and 4, above, were dicta and that the District Court had perceived that the a ruling on the time-bar claim had resolved the entire case. Appellants informed the District Court that such a ruling would not

resolve the declaratory judgment issues that were pending before the District Court and that pursuant to Utah Code Ann. § 78-33-2 any person "whose rights, status or other legal relation are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute and obtain a declaration of rights, status or other legal relations thereunder." (See R. 271-282). Because the Appellants believed that the ruling on the time-bar claim did not resolve the other declaratory requests in its Complaint, Appellants filed a Motion to Rule on all Claims on November 22, 1991 in which Appellants requested that the District Court include findings 2, 3 and 4, above, as its declaratory rulings on the declaratory claims contained in the Complaint. (R. at 284-293).

On November 25, 1991, Appellees filed a proposed form of Summary Judgment with the District Court for the Memorandum Decision of November 6, 1991, as amended. (R. at 321-323). On December 2, 1991, the District Court executed and filed the Summary Judgment and thereby ruled against the Appellees on "all claims." (R. at 321-323). On December 16, 1991, the District Court issued a Memorandum Decision wherein the District Court denied Appellants' Motion to Rule on All Claims because it considered it to be a "motion to reconsider the issues upon which this court has already ruled [and because] it is not a motion which exists under our rules." (R. at 333).

This appeal seeks review of the District Court's Summary Judgment dated December 2, 1991.

SUMMARY OF ARGUMENT

The Utah Declaratory Judgment Act authorized the Appellants to commence their declaratory judgment action and include therein damage and injunctive causes of action. Each of these separate, but combined, actions have distinct elements and limitation periods. The District Court failed to recognize the separate and distinct nature of the claims and committed manifest error when it concluded that all of the claims were moot because the injunctive claim for relief could not be awarded because the 30-day period for filing a petition had passed. This conclusion failed to recognize that the declaratory and damage claims did not deal with the filing of a petition but with Payson City's refusal to accept an application for certified petition copies, and that an action seeking a declaration of rights under a statute and provision of the constitution cannot become moot when the statute and provision are still in effect. This Court should reverse the District Court's conclusion that the declaratory and damage claims are moot and enter judgment on these claims.

The enactment of the Payson City utility tax ordinance was the establishment of an entirely new tax that had not previously been imposed on the citizens of Payson

City. The establishment of this entirely new tax scheme was a legislative act, and as a legislative act, is subject to the referral and initiative provisions of Utah Const. art. VI, § 1. When Payson City refused to provide petition copies to the Appellants it violated Appellants' rights under the Utah Constitution to refer "any legislation."

The United States Supreme Court has declared that states are not required to give their people the right to legislate and petition government through the use of initiatives and referenda. However, the United States Supreme Court has ruled, that when a state constitution gives the referral and initiative rights to its people, it creates a federal right (one protected under the First and Fourteenth Amendments) to petition government and engage in political speech that cannot be abrogated by the state unless it amends its constitution to remove the right or has an overriding state interest. The Utah Constitution vests the people with the right to refer and initiate "any legislation." Thus, the people of Utah have a federally protected right to use the initiative and referral process. When Payson City refused to recognize Appellants' application for petition copies it unlawfully interfered with the Appellants' right to petition government and engage in free speech and violated the the First Amendment, Fourteenth Amendment and the Civil Rights Act (42 U.S.C. § 1983).

Payson City has attempted to justify its interference with Appellants' constitutional rights by claiming that Utah Code Ann. § 20-11-21(2)(b) prohibits the referral and initiation of "tax levies." This argument is misplaced because the utility tax ordinance is not a tax levy. The term tax levy does not apply to the enactment of a new tax scheme, but only means the administrative act of setting the general property tax mill levy. Moreover, if the utility tax ordinance were, for some reason, included within the meaning of the term tax levy, then Utah Code Ann. § 20-11-21(2)(b) would violate the Utah and United States Constitutions because it attempts to proscribe the referral and initiation of "any legislation."

ARGUMENT

I. THE DISTRICT COURT'S ENTRY OF JUDGMENT ON THE INJUNCTIVE CLAIM FOR RELIEF DID NOT RESOLVE THE DECLARATORY CLAIMS FOR RELIEF OR RENDER THEM MOOT.

The Utah Declaratory Judgment Act provides that parties may advance declaratory and injunctive claims for relief in the same action.[2] Once these claims are joined in an action the district court must rule on all claims before it can terminate the action. Utah R. Civ. P. 54(b). Mistakenly,

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2. "The district courts within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed." Utah Code Ann. § 78-33-1.

the district court concluded, that because the 4th claim for relief (injunctive relief) was barred, the other claims became moot and thus it would not decide the declaratory or damage issues. This conclusion is erroneous for the following reasons:

First, contrary to the district court's conclusion, the gravamen of this case is not whether a referendum petition may now be filed. The conduct that is challenged in this case, and which generates the constitutional and statutory questions, is Payson City's refusal to accept the Application. At the moment the Application was denied, the Appellees violated state and federal law and caused the Appellants to suffer damage because their rights and ability to petition government for redress of grievances and engage in political speech through the discussions that come with the circulation of certified petition copies had been abrogated.

Pursuant to Utah Code Ann. § 78-12-28, a declaratory judgment action or action for damages may be filed to challenge Payson City's denial of the Application anytime within a two-year period of the date on which the Application was denied. The Court's conclusion that a Petition may not now be filed because 30 days has elapsed since the enactment of the utility tax has nothing to do with the time period in which an action may be brought to challenge whether the City acted inappropriately in denying the Application.

Second, this Court has ruled that declaratory judgments should be "liberally construed and administered" especially "where there is a substantial public interest to be served by the settlement of such an issue." Salt Lake County v. Salt Lake City, 570 P.2d 119, 121 (Utah 1977); see Whitmore v. Murray City, 107 Utah 445, 154 P.2d 748, 751 (1944) ("[D]eclaratory judgment is proper remedy 'whenever it will serve a useful purpose in settling the uncertainty'")(quoting Gray v. Defa, 135 P.2d 103 Utah 339, 251, 254 (1943)).

Third, a declaratory judgment action seeking a determination of a party's rights under a particular constitutional provision and a particular statute cannot become moot when the constitutional provision and statute are still in effect and the party's rights are subject to actual or threatened controversy. See Grant v. Meyer, 828 F.2d 1446, 1449 (10th Cir. 1987), aff'd, 486 U.S. 414 (1988); Energy Research Foundation v. Foote, 628 P.2d 173 (Colo. Ct. App. 1981) (action seeking declaration of a party's rights under the Nonresidential Buildings Act became moot when the Act was repealed); Salt Lake County v. Salt Lake City, 570 P.2d 119, 121 (Utah 1977)(declaratory judgment action should proceed if it "appear[s] either that there is actual controversy, or that there is a substantial likelihood that one will develop so that the adjudication will serve a useful purpose in resolving or avoiding controversy or possible litigation").

In the present case there is both an actual controversy and the likelihood that entry of declaratory judgment will resolve future controversy. The Appellants were denied certified petition copies under their Application. This denial made it more difficult, if not impossible, to timely file a Petition within 30 days because they would have to make their own circulation copies or raise sufficient money to file a legal action to compel the recorder to issue certified petition copies. This denial of the Application infringed on Appellants' constitutional rights even before they were required to file a Petition that had been signed by the requisite number of voters. A determination that a Petition cannot now be filed because the 30-day period has elapsed does not answer the question whether Payson City's conduct in denying the Application was improper and violated Appellants' statutory and constitutional rights to file the Application.

Furthermore, the entry of declaratory judgment in this matter will serve the useful purpose of setting forth the rights of the citizens of Utah and of resolving future controversy that need not come before this Court. The Court should be aware that taxes are still being collected from the Appellants under the utility tax ordinance and that the Appellants and other Payson citizens are currently preparing an initiative application that will challenge the very utility

tax that is at issue in this appeal. If a declaratory judgment is not entered declaring that the utility tax ordinance is legislative and subject to initiative, Payson City will continue to deny applications that are filed in relation to the utility tax ordinance and the Appellants will again be forced to either draft their own petition copies or to raise money to bring another declaratory judgment action. Appellants should not be forced to have to pursue these remedies every time they attempt to use their constitutional right of referral and initiative. The entry of declaratory judgment in this matter can resolve future controversy and obviate the waste of judicial resources.[3]

To avoid this repetitive burden, the United States Supreme Court and the Tenth Circuit Court of Appeals have both ruled, in the initiative and referendum context, that a declaratory judgment action is proper even though the time for filing the Petition or the election on which the ballot would have appeared has passed. Both courts have ruled that declaratory judgment actions are proper because the challenged law remains on the books and "it is reasonable to expect that

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3. For a more detailed discussion of Utah's Declaratory Judgment Act and Appellants' entitlement to declaratory relief in this case see Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Summary Judgment, pp. 23-24 (R. at 66-67); Plaintiffs' Reply Memorandum, pp. 7-8 (R. at 183-184); Utah Restaurant Ass'n v. Davis County Bd. of Health, 709 P.2d 1159 (Utah 1985); and Baird v. State, 574 P.2d 713 (Utah 1978).

the same controversy will recur between these two parties" when the Appellants make "future attempts to obtain signatures necessary to place the issue on the ballot." Meyer v. Grant, 108 S. Ct. 1886, 1990 n. 2 (1988); Grant v. Meyer, 828 F.2d 1446, 1449 (10th Cir. 1987)(en banc).

Finally, even if the declaratory claims were assumed to be moot, it is well established in Utah precedent that even though an appellate court upholds a trial court's determination that a particular issue is moot, the appellate court may "retain jurisdiction over the nondispositive [or moot] issues where the public interest is involved and where there are 'questions of constitutional interpretation, issues as to the validity or construction of a statute, or the propriety of administrative rulings.'" W. & G. Co. v. Redevelopment Agency of Salt Lake City, 802 P.2d 755, 765 (Utah Ct. App. 1990)(quoting, McRae v. Jackson, 526 P.2d 1190, 1191 (Utah 1974)); see also Wickham v. Fisher, 629 P.2d 896, 899-900 (Utah 1981). This appeal falls well within these guidelines. The declaratory claims concern the interpretation of the Utah and United States Constitutions and the construction of Utah and federal statutes. The resolution of these claims impacts important rights of the public to engage in political speech and petition its government for redress of grievances. Not only will the entry of declaratory judgment in this matter serve the useful purpose of setting forth the

rights of the citizens of Utah, but it will also resolve future controversy that need not come before this Court and thereby conserve judicial resources.

For the reasons set forth above, the Court should reverse the District Court's decision that the declaratory judgment claims are moot and enter judgment on the declaratory claims as set forth below.

II. THE UTAH CONSTITUTION GUARANTEES THAT THE PEOPLE MAY BRING A REFERENDUM AGAINST THE ENTIRELY NEW TAX LEGISLATION ENACTED BY PAYSON CITY.

Article VI, section 1 of the Utah Constitution guarantees the people the right to initiate "any desired legislation" or to review "any law or ordinance" by popular vote. See text of article VI, supra at vi. Application of section 1 is relatively straightforward: legislative actions by government entities are subject to initiatives and referenda, other governmental actions (such as administrative decision making) are not.[4]

Simply stated, the issue presented in this appeal is whether or not the enactment of a new tax scheme is a "legislative" act that may be referred to the people. Utah,

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4. To facilitate the orderly use of the the initiative and referral right, the legislature is authorized to prescribe the ministerial tasks required to get the issue to the ballot, i.e. the forms to use, number of signatures and time deadlines. The legislature does not have the power to preempt one type of legislation, be it a new tax scheme or new zoning ordinance, from the people's right of referral without amending the Constitution.

like most other states, has identified several tests that are generally used to distinguish between legislative and administrative ordinances:

> (1) "'The crucial test for determining what is legislative and what is administrative is whether the ordinance is one making a new law, or one executing a law already in existence.'" Keigley v. Bench, 97 Utah 69, 89 P.2d 480, 484 (1939)(quoting, Whitbeck v. Funk, 140 Or. 70, 12 P.2d 1019, 1020 (1932)).
>
> (2) "'Acts constituting a declaration of public purposes and making provisions of ways and means of accomplishment may be generally classified as calling for the exercise of legislative power.'" Keigley v. Bench, 97 Utah 69, 89 P.2d 480, 484 (1939)(quoting, State v. Charles, 136 Kan. 875, 18 P.2d 149, 150 (1933)).
>
> (3) "'In determining whether the ordinance in question was legislative or administrative, we notice that the authorities . . . are in accord that actions which relate to subjects of a permanent or general character are considered to be legislative, while those which are temporary in operation and effect are not.'" Keigley v. Bench, 97 Utah 69, 89 P.2d 480, 484 (1939)(quoting, Monahan v. Funk, 137 Or. 580, 3 P.2d 778, 779 (1931)).
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> (4) The Court has also looked to a "practicality test" in finding an ordinance to be administrative in nature: i.e., that the particular ordinance requires that an action be performed by "persons having specialized training and experience."

Shriver v. Bench, 6 Utah 2d 329, 313 P.2d 475, 478 (1957).[5]

Although Utah courts have not previously been required to apply these tests to determine whether the enactment of an entirely new tax scheme is a legislative or administrative act, other states have. The other states that haves applied these tests to the enactment of a new tax scheme have concluded that such enactments are legislative acts. See Citizens For Financially Responsible Government v. City of Spokane, 99 Wash. 2d. 339, 662 P.2d 845, 850-851 (1983)(enactment of a business and occupation tax by the city "was a legislative act under any applicable test"); Campbell v. City of Eugene, 116 Or. 264, 240 P. 418, 424 (1925) ("the enactment of the charter amendment . . . involves a question of taxation, and is legislative."); see also Rocky Mountain Oil and Gas Ass'n v. State Board of Equal., 749 P.2d 221, 240 (Wyo. 1987) ("The power to tax is a legislative power."); Rego

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5. The Utah Supreme Court, on at least three occasions, has used combinations of the above tests to determine whether an action is legislative or administrative. See Keigley v. Bench, 97 Utah 69, 89 P.2d 480 (1939) (court relied on "new law" test to determine that an ordinance making changes in a prior bond ordinance was partially legislative and partially administrative); Shriver v. Bench, 6 Utah 2d 329, 313 P.2d 475 (1957) (court used a combination of the tests to rule that a city ordinance setting the salaries of policemen and firemen was an administrative function); and Wilson v. Manning, 657 P.2d 251 (Utah 1982) (a combination of the tests is used to rule that initial enactments of zoning ordinances are generally legislative actions and amendments to zoning are generally administrative).

Properties Corp. v. Finance Adm'r, 102 Misc. 2d 641, 424 N.Y.S. 2d 621, 623 (N.Y. Sup. Ct. 1980)("The power to lay a tax . . . is exclusively a legislative function.")(quoting, Matter of Mollenhauer's Will, 257 A.D. 286, 13 N.Y.S. 2d 619, 621 (N.Y. App. Div. 1939)); In Re Garrison Div. Conservancy Dist., 144 N.W. 2d 82, 95 (N.D. 1966)("The power to levy taxes is a legislative power . . . [that ultimately] rests with the people.").[6]

The imposition of the new utility tax in Payson meets all the relevant tests established by the Utah Supreme Court for legislative action. First, such an ordinance is new and does not involve the mere application of existing law. Prior to 1990, the tax did not exist and the citizens were not required to pay such a tax to Payson City. Second, such an Ordinance tends to be permanent in nature. The Ordinance creating the new tax does not have a sunset provision and the tax is currently being imposed and will continue to be imposed indefinitely. Third, such an Ordinance is a means of accomplishing the general public purpose of raising revenue for such "city projects" as capital improvements to the golf course, a culinary well and engineering for pressurized irrigation. (R. at 56-58, 104); see generally 5 E. McQuillin,

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6. The enactment or levy of a new or separate tax by a legal subdivision is generally perceived as a "legislative" matter: "In levying taxes, a county board acts in a legislative capacity." 20 C.J.S. Counties § 283 (1940 & Cum. Supp. 1989).

The Law of Municipal Corporations § 16.55 (3d ed. 1989). Fourth, ascertaining the wisdom vel non of a new tax does not call for any "specialized training and experience" beyond the ken of the ordinary taxpayer. Shriver v. Bench, 313 P.2d at 478. Indeed, any conclusion that taxpayers are incompetent to pass upon the practical wisdom of a new tax scheme would dramatically re-order fundamental principles of American democracy. Instead of forming the basis of government, "We the people," would become the hostages of government. U.S. Const. Preamble.

Although Utah has not been required to directly determine whether an entirely new tax scheme is a legislative act, this Court has indirectly reviewed this issue and declared that municipal ordinances establishing new taxes are legislative acts. In Continental Bank and Trust Co. v. Farmington City, 599 P.2d 1242, 1245 (Utah 1979) and Davis v. Ogden City, 117 Utah 315, 215 P.2d 616, 623 (1950), this Court reviewed the constitutionality of a newly enacted municipal business revenue tax and a occupation tax, and declared that in reviewing the taxes it would not question the "legislative discretion" or "wisdom or policy of the [tax] law[s]."

The Court should also note, that experience shows that laws establishing tax schemes are legislative acts that are subject to initiatives and referenda in Utah. Since Utah Code Ann. § 20-11-21(2)(b)'s prohibition against initiatives

and referenda for "tax levies" was enacted the state has allowed various legislative acts relating to tax legislation to be initiated for referred. For example, the 1990 general election ballot included a tax initiative on whether the state sales tax act should be amended to exempt food sales from sales tax. In addition, the 1988 general election ballot included three tax initiatives: (1) whether an income tax credit should be given to Utah families who choose to educate their children at home, (2) whether the tax and spending limitations in the state should be amended, and (3) whether the People's Tax Reduction Act should be enacted.

Based on the foregoing, it is beyond dispute that the imposition of an entirely new tax -- like the new utility tax ordinance involved here -- is a legislative act. As a result, article VI, section 1 of the Utah Constitution authorizes Appellants to submit such legislation to the legal voters of Payson City. The Appellants are entitled to a declaration that they may initiate or refer an entirely new tax scheme such as the Payson City utility tax.

III. APPELLANTS HAVE AN INDEPENDENT FEDERAL RIGHT TO REFER THE NEW UTILITY TAX SCHEME.

The United States Supreme Court has ruled that when a state constitution grants its people the right to initiate or refer legislative acts it creates a federal right to petition the government that is protected under the United States Constitution:

> The First Amendment provides that Congress "shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. The Fourteenth Amendment makes that prohibition applicable to the State[s].
>
> . . .
>
> [T]he circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as "core political speech."
>
> . . .
>
> Appellees seek by petition to achieve political change in Colorado; their right freely to engage in discussion concerning the need for that change is guarded by the First Amendment.
>
> Meyer v. Grant, 486 U.S. 414, 108 S. Ct. 1886, 1891-1892 (1988) (citations omitted).

In Meyer, the Court ruled that Colorado could not impose limitations on the people's, state-created initiative right or otherwise interfere with that right unless there was an overriding state interest. There, the court ruled that a state statute prohibiting the plaintiff from paying workers to

circulate petition copies and circulation sheets infringed on the plaintiff's initiative rights because it abridged his right to be involved in free political speech. The court also held that the state's concern to ensure that only initiatives that had sufficient "grass-roots" support were placed on the ballot did not override plaintiff's right to free speech and to petition the government. The court explained that other Colorado laws that prescribed who could sign the petition and the number of individuals who had to sign the petition provided sufficient protection to ensure that only initiatives with sufficient support were actually placed before the people. Meyer, 108 S. Ct. 1886, 1894.

In the present case, there is no overriding state interest in preventing the people from bringing a referendum against the legislative enactment of a new tax. The state's interest in ensuring that local governments are not unduly restricted in completing their administrative tasks is protected by state law that prevents the use of referenda and initiatives to challenge administrative acts.

Inasmuch as the Appellant's First Amendment right to petition the government for redress of grievances and to engage in political speech have been abridged by the Appellees' refusal to provide them with petition copies, the Appellants' may obtain relief under the Civil Rights Act, 42 U.S.C. § 1983 (1986), and a declaration that the Appellees'

conduct violated their civil rights. See the complete text of 42 U.S.C. § 1983, supra at vi; see also Dennis v. Higgins, ___ U.S. ___, 111 S. Ct. 865 (1991) (an action under § 1983 will stand when "'any rights, privileges, or immunities secured by the Constitution and laws" are abridged) (emphasis in original, citations omitted).

As part of this judgment, the Appellants are entitled to an order awarding them reasonable attorneys' fees. 42 U.S.C. § 1988. Attorneys fees under § 1988 are awarded, and are appropriate in this case, because all of society is benefited when a plaintiff successfully obtains a judicial declaration that protects and secures a constitutional and civil right of the people.

IV. UTAH CODE ANN. § 20-11-21(2) ONLY BARS THE REFERRAL AND INITIATIVE OF THE "PROPERTY TAX MILL LEVY." IT DOES NOT PREVENT THE REFERRAL OF A NEW TAX SCHEME.

Utah Code Ann. § 20-11-21 reads as follows:

> [T]he legal voters of any county, city, or town, in numbers required by this chapter, may initiate any desired legislation and cause it to be submitted to the governing body or to a vote of the people of the county, city, or town for approval or rejection, or may require any law or ordinance passed by the governing body of the county, city, or town to be submitted to the voters before the law or ordinance takes effect.
>
> (2)(a) The legal voters of any county, city, or town may not initiate budgets or changes in budgets, or tax levies, or changes in tax levies.
> (b) The legal voters of any county,

> city, or town may not require any budget or tax levy adopted by the governing body of the county, city, or town to be submitted to the voters.

Utah Code Ann. § 20-11-21 (emphasis added).

Appellees contend that the above statute means that initiatives and referenda may not be brought against any ordinance that deals with taxes. Appellants, on the other hand, contend that the legislative proscription of a popular vote to challenge a "budget" or a "tax levy" refers solely to the ministerial processes associated with administering a budget or setting a tax levy pursuant to legislative fiat, and does not include the legislative decisions taken in appropriating money for a budget, enacting a new taxing scheme, or in setting a tax rate which involves a policy choice rather than ministerial arithmetic calculations.

As previously discussed, the '"power to lay a tax, to determine the proportion thereof to be exacted from specified individuals or groups, [and] to determine its incidence, [are] exclusively legislative function[s].'" Rego Properties v. Finance Admin., 102 Misc. 2d 641, 424 N.Y.S. 2d 621, 623 (N.Y. Sup. Ct. 1980)(citations omitted). Consequently, significant litigation has evolved throughout the country as to whether the legislative body can delegate any of ministerial tasks associated with the enactment and imposition of taxes (i.e. power to set rates or determine property groups). Generally,

it is accepted that certain ministerial tasks may be delegated to agencies or commissions if definitive formulas and guidelines are prescribed by the legislative body. Id. at 624-625. By way of summary then, legislative acts that cannot be delegated would include such policy-type actions as deciding (1) the type of tax scheme that is to be used to raise the revenue,[7] (2) the amount of revenue that should be raised from the particular tax,[8] and (3) the rate at which the tax levy will be imposed.[9] The administrative tasks associated with administering a tax that may be delegated would include such items as (1) preparing the tax notices, (2) conducting property assessments, (3) collecting and dispensing the tax, and (4) in the property tax scheme, using the

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7. Pursuant to Utah Const. art. XIII, § 12, the Legislature has the power to enact various tax schemes. See also Utah Const. art XIII, § 2(11) (The Legislature shall provide by law for an annual tax sufficient . . . to defray the estimated ordinary expenses." (emphasis added).

8. Annually, the Legislature determines the amount of money to be appropriated and collected. Utah Const. art. VII, § 8; Utah Code Ann. § 63-38-3. The Governor has veto power over these appropriations. Id; see Utah Code Ann. §§ 10-5-101 to 131 and 10-6-101 to 159 for the corresponding powers of municipalities and counties.

9. An example that illustrates that the setting of a tax rate is a legislative act is found in Utah Code Ann. § 59-2-905: "The Legislature shall set the minimum rate of levy on each dollar of taxable value of taxable property . . . to pay the state's contribution to the cost of the minimum school program for that year. (emphasis added).

statutory formula found in Utah Code Ann. § 59-2-913(2) to set many of the general property tax levies.[10]

The first question presented here, therefore, is to determine whether the proper legal construction of the term "tax levy" as used in Utah Code Ann. § 20-11-21(2) refers to a legislative or administrative task. If "tax levy" refers to a legislative task the statute must be declared unconstitutional. The starting point for interpreting any statute is the plain language of the enactment. P.I.E. Employees Federal Credit Union v. Bass, 759 P.2d 1144, 1151 (Utah 1988)("The best evidence of the true intent and purpose of the Legislature in enacting the Act is the plain language of the Act")(citing Jensen v. Intermountain Health Care, Inc., 679 P.2d 903, 906 (Utah 1984)). When interpreting the plain language of § 20-11-21(2), the statute should be "closely scrutinized and narrowly construed" so as to preserve the people's right to petition the government. Meyer v. Grant, 486 U.S. 414, 108 S.Ct. 1886, 1892-1893 (1988).[11] Legislative

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10. Utah Code Ann. § 59-2-913(2) provides that once the governing body has exercised its legislative authority to decide how much revenue needs to be raised, the governing body shall perform the administrative task of determining the general property tax levy. The governing body calculates this rate by taking the revenue amount, dividing it by the "taxable value of all property taxed, less estimated deferrals or abatements in the current tax year, [and multiplying the dividend] by the percentage of property taxes collected for the immediately preceding fiscal year."

11. Accord, 5 E. McQuillin, The Laws of Municipal Corporations § 16.51 (3rd ed. 1989) (as a general rule, "grants of power to . . . adopt municipal legislation by exercise of initiative or referendum are to be liberally construed to the ends of permitting rather than restricting the power").

history, moreover, may be used to clarify any ambiguity in the plain language of the statute.[12] Here, whether the interpretation of "tax levy" is based upon plain language, statutory context, or legislative intent, Utah Code Ann. § 20-11-21 does not support the Appellees' refusal to provide Appellants with certified petition copies.

A. "Tax Levy," as used in § 20-11-21(2) and elsewhere in the Utah Code, means the ministerial process of determining and listing the general property tax rate established pursuant to Utah Code Ann. § 59-2-913(2).

An examination of the possible meanings of the term "tax levy" reveals at least two different denotations. First, "tax levy" may be interpreted to mean the "legislative function" of enacting a new tax scheme.[13] Second, "tax levy" may be interpreted to mean the "ministerial function of listing and extending taxes" (i.e., the listing of the general tax rate under Utah Code Ann. § 59-2-913(2)).[14] These two

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12. P.I.E. Employees, 759 P.2d at 1151 ("When the language of a particular provision of a statute is ambiguous, the Court may attempt, following principles of statutory construction, to ascertain the intention of the Legislature"); DeLuca v. Department of Employment Sec., 746 P.2d 276, 277-278 (Utah Ct. App. 1987) ("where a statute is ambiguous, we examine the legislature's intent in enacting the statute").

13. Black's Law Dictionary 1308 (5th ed. 1989)("tax levy" means "the bill, enactment or measure of legislation by which an annual or general tax is imposed"). See also Fenton v. City of Delano, 162 Cal. App. 3d 400, 208 Cal. Rptr. 486 (5th Dist. Ct. App. 1984) ("tax levy" means the general enactment of tax provisions); Dare v. Lakeport City Council, 12 Cal. App. 3d 864, 91 Cal. Rptr. 124 (1st Dist. Ct. App. 1970) ("tax levy" defined to include tax ordinance levying tax on usage of sewer facilities).

14. Black's Law Dictionary 816 (5th ed. 1989); Brooks v. Zabka, 168 Colo. 265, 450 P.2d 653 (1969).

different meanings of the term "tax levy" result from the fact that the imposition of a tax is a multiple-step process, and several steps may be somewhat imprecisely referred to as the "tax levy."[15]

Despite the possibility of two interpretations of the term "tax levy," a thorough reading of Utah tax statutes reveals that the Utah legislature did not use the term "tax levy" to mean the enactment of a new tax scheme. With limited exception,[16] the term "tax levy" is used throughout Utah's tax statutes to denote the ministerial step of determining the general rate of tax to be applied to property under the property tax act. See Utah Code Ann. § 59-2-902(2)("The commission shall . . . determine . . . the amount to be raised by the minimum basic tax levy."); Utah Code Ann. §§ 59-2-913(2) (The property tax "levy set for each applicable fund of the taxing entity is determined by dividing the budgeted property tax revenues . . . by the sum of the taxable value of all property taxed."); Utah Code Ann. §§ 59-2-923 ("a taxing

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15. "Tax levies" are frequently referred to as "mill levies" because the rate of the tax is set in a decimal that equates to one tenth of cent. For example, a tax rate of one mill (.001) equates to $1 of tax on every $1,000 of taxable property value. The term "levy" is frequently interchanged with "rate." For example, "the school district tax levy is three mills (.003)."

16. As previously noted "tax levy" is used occasionally in the Utah Code to denote specific property tax levies, such as the minimum school levy. Utah Code Ann. § 59-2-905. These specific levies are usually set by legislative act and are not determined pursuant to a statutory formula as is the general property tax levy.

entity which intends to exceed its certified tax levy may not adopt its final budget."); Utah Code Ann. §§ 59-2-924(2)(a)("The certified tax rate shall be the actual levy.").[17]

Not only is the Utah Code consistent in using the term "tax levy" to mean the general property tax levy rate, but the Utah Code is also consistent in not using the term to describe a municipality's power to establish or enact a new tax scheme. Rather, the Utah Code consistently distinguishes the power to impose (or collect) a tax from the power to establish a tax rate (or levy). For example, code sections that allow municipalities to impose new tax schemes generally refer to the power as the right to "levy and collect taxes:" a "municipality may raise revenue by levying and collecting a license fee or tax" (Utah Code Ann. § 10-1-203 (emphasis added); "special taxes shall be levied and collected" (Utah Code Ann. § 10-8-4)(emphasis added).

Additional guidance in interpreting the meaning of "tax levy" may be obtained from the Colorado Supreme Court's decision in Brooks v. Zabka, 168 Colo. 265, 450 P.2d 653 (1969). In Brooks v. Zabka, the court was required to decide

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17. See generally, Utah Code Ann. §§ 59-2-901 to 924; i.e. § 59-2-912 ("Time for adoption of levy . . . The governing body of each entity shall before June 22 of each year, adopt a proposed . . . final tax rate."); § 59-2-913(3)("The format of the statement shall . . . cite . . . provisions which limit the property tax levy for any taxing entity.").

whether a referendum could be brought to challenge a sales tax ordinance when the city charter expressly provided that referenda could not be used for "ordinances making the tax levy [and] making the annual appropriation." Id. at 655. In Brooks v. Zabka, the Court determined that the statutory "tax levy" language referred to the property tax mill levy. The Court based its decision on two primary considerations: (1) plain language and (2) the practical need not to allow a referendum on the establishment of annual property tax rates. Id.

The Court first concluded that the "tax levy" referred to property taxes. Inasmuch as the Colorado Code was replete with references and certification requirements for the "tax levy" and the property tax levy was the only tax levy so referred to, the Colorado Supreme Court ruled that the "tax levy" meant the property tax levy. Id. The Court recognized that the determination of the property tax levy was an annual occurrence and tended to be administrative in nature. The Court then recognized that the enactment of a sales tax provision was significantly different from the "tax levy" because it was an entirely "new scheme of taxation" and thus did not bear the same time constraints the "tax levy" bore in its annual ascertainment. Id. The referendum for the sales tax issue was therefore allowed.

Although the law underlying the Colorado decision is not identical to Utah law, the opinion nevertheless provides useful guidance here. Like the Colorado Code, the Utah Code is replete with references to the "tax levy" as the annual administrative act of setting the general tax rate on applicable property. See Utah Code Ann. §§ 59-2-901 to 924. Moreover, like the tax at issue in Brooks v. Zabka, the municipal ordinance challenged here is a "new scheme of taxation." See Brooks v. Zabka, 450 P.2d at 653. Furthermore, there are no practical impediments to use of a public referendum to challenge the legislative imposition of a new tax, as there might be with popular challenges to the annual ministerial -- and time sensitive -- calculations of the general property tax levy. See Brooks v. Zabka, 450 P.2d at 655. As a result, Brooks v. Zabka supports the interpretation of § 20-11-21(2) urged by Appellants.

"Tax levy," as used in Utah Code Ann. § 20-11-21(2), means the "general tax levy rate." If, however, the consistent use of the term "tax levy" in the Utah Code is insufficient to remove all doubt as to the meaning of the term, reference to the legislative history of Utah Code Ann. § 20-11-21(2) confirms that "tax levy" means the "general property tax mill levy rate."

B. The legislative intent surrounding § 20-11-21(2) reveals that "tax levy" means the general property tax mill levy.

Prior to 1985, Utah Code Ann. § 20-11-21 mirrored article VI, section 1 of the Utah Constitution and placed no limitations on the use of the initiative or referendum power. In 1985, the legislature passed Senate Bill 80 and amended § 20-11-21 by adding subsection (2):

> The legal voters of any county, city, or town may initiate any desired legislation in accordance with Sections 20-11-26 through 20-11-36.
>
> Utah Code Ann. § 20-11-21(2)(1985).

Section 20-11-26, in turn, stated that the legal voters could initiate desired legislation by adopting any "measure." Section 20-11-27, however, defined "measure" to mean "any ordinance, resolution or franchise, but . . . not a budget, mill levy, or zoning ordinance." Utah Code Ann. § 20-11-27(3) (1985) (emphasis added).

Subsequent to the 1985 amendments, it became apparent that some zoning laws could not be constitutionally excluded from the initiative power because they were legislative in nature. Wilson v. Manning, 657 P.2d 251 (Utah 1982). In an effort to rectify this problem and to clarify the procedures associated with the initiative and referendum power as they related to cities and counties, the 1987 legislature amended Section 20-11-21 by passing Senate Bill No. 9. Senate Bill

No. 9 repealed Sections 20-11-26 through 20-11-36 and amended Section 20-11-21(2) to read as follows:

> (2) (a) The legal voters of any county, city, or town may not initiate budgets or changes in budgets, or tax levies or changes in tax levies.
>
> (b) The legal voters of any county, city, or town may not require any budget or tax levy be adopted by the governing body of the county, city, or town to be submitted to the voters.

When the sponsor of Senate Bill No. 9, Senator Finlinson, explained the changes to Section 20-11-21(2), he acknowledged that the limitation on zoning ordinances had been removed (1) because not all zoning ordinances were administrative in nature and (2) because legislative zoning ordinances had to be amenable to the people by way of initiatives or referenda.[18] As to the language of "budgets or tax levies," Senator Finlinson explained that this language was merely intended to provide continuation of the limitations that had existed in the previous statute against mill levies. The discussion from the Senate floor debates reveals that the limitations contained in § 20-11-21(2)(a) & (b) were to prevent the use of initiatives and referenda to challenge a governing body's actions to determine the <u>rate</u> at which the property tax is to

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18. A transcript of the Senate debates on Senate Bill No. 9 is found in the Record at 37-47.

be levied. Transcript, Senate Floor Debates on Utah Senate Bill 9, 1987 (R. at 38)("So the bill really does bring uniformity with the cities and the counties, and it follows now the will of the Senate in saying the budgets and mill levies are not subject to referendum.")(emphasis added).

Not only do the comments of the legislators demonstrate that the meaning of "tax levies" denotes the annual setting of the general property tax rate, but rules of statutory construction also yield the same conclusion. This Court is required to give a statute a constitutional interpretation if possible.[19] As explained in Section II, above, the Utah Constitution authorizes referenda for "legislative" acts but not for "administrative" acts.[20] If "tax levy" is read, as intended by the legislature, to mean the setting and evaluation of the general tax rate or mill levy to be used for property tax purposes, § 20-11-21(2) may well be constitutional because the setting of the general mill levy pursuant to a rote formula may be classified as an

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19. See State v. Lindquist, 674 P.2d 1234, 1237 (Utah 1983) ("it is the duty of this Court to construe a statute to avoid constitutional infirmities whenever possible"); Celebrity Club Inc. v. Utah Liquor Control Comm'n., 657 P.2d 1293, 1294 (Utah 1982)("statutes where possible, are to be construed so as to sustain their constitutionality").

20. The Utah Supreme Court has consistently upheld a citizen's right to refer and initiate "legislative" acts. See Wilson v. Manning, 657 P.2d 251, 253 (Utah 1982) (initiatives and referenda only apply to ordinances that are legislative in character); Shriver v. Bench, 6 Utah 2d 329, 313 P.2d 475, 476 (1957) ("initiative and referendum laws apply only to matters which are legislative").

administrative act. This interpretation would also comply with the United States Supreme Court's direction that "statutes that limit the power of the people to initiate legislation are to be closely scrutinized and narrowly construed" so as to preserve the people's right to petition the government. Meyer v. Grant, 486 U.S. 414, 108 S.Ct. 1886, 1892-1893 (1988). If "tax levy" is read to mean the creation of a new tax scheme, however, then the statute violates both the state and federal constitutions.

CONCLUSION

Based on the above argument, Appellants respectfully request that the Court reverse the District Court's December 2, 1990 Summary Judgment and enter an order that (1) declares that the enactment of a new tax scheme like the Ordinance is a legislative act that is subject to referendum and initiative, (2) declare that "tax levy" as used in Utah Code Ann. § 20-11-21(2) only denotes the setting of the property tax mill levy, or in the alternative, that "tax levy" denotes a legislative act and thus Utah Code Ann. § 20-11-21(2) is unconstitutional because it proscribes the referral of "any legislation," (3) a declaration that Appellees violated Appellants' federal and civil rights in violation of 42 U.S.C. § 1983 when they refused to recognize the Application and not issue certified

petition copies, and (4) a declaration and order that Appellants are entitled to reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

RESPECTFULLY SUBMITTED this 6th day of April, 1992.

HOLME ROBERTS & OWEN

By _____
Mark K. Buchi
David J. Crapo

CERTIFICATE OF MAILING

I HEREBY CERTIFY that pursuant to Rule 4 of the Utah Rule of Appellate Procedure I mailed in the U.S. mail, postage prepaid, four (4) true and correct copies of the foregoing BRIEF OF APPELLANTS this 6th day of April, 1992, to the following:

Craig Carlile
Ray, Quinney & Nebeker
92 North University Avenue
Provo, Utah 84601